

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

7 EDWARD C. GREEN, )  
8 Plaintiff, )  
9 v. )  
10 CAROLYN W. COLVIN, Acting )  
11 Commissioner of Social )  
12 Security,<sup>1</sup> )  
Defendant )  
 ) No. CV-11-3105-CI  
 ) ORDER GRANTING PLAINTIFF'S  
 ) MOTION FOR SUMMARY JUDGMENT  
 ) AND REMANDING FOR ADDITIONAL  
 ) PROCEEDINGS PURSUANT TO 42  
 ) U.S.C. § 405(g)

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 18, 22. Attorney D. James Tree represents Edward C. Green (Plaintiff); Special Assistant United States Attorney Robert L. Van Saghie represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter for additional proceedings pursuant to 42 U.S.C. § 405(q).

<sup>1</sup> Carolyn W. Colvin became Acting Commissioner of Social Security on February 14, 2013. Under FED. R. CIV. P. 25 (d), Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REMANDING FOR ADDITIONAL PROCEEDINGS PURSUANT TO 42 U.S.C. § 405(g) - 1

## JURISDICTION

2 Plaintiff protectively filed for Supplemental Security Income  
3 (SSI) on September 21, 2007. Tr. 63.<sup>2</sup> He alleged disability due to  
4 major depressive disorder, anxiety, and bipolar disorder with an  
5 alleged onset date of September 21, 2007. Tr. 63, 199. His claim  
6 was denied initially and on reconsideration. Plaintiff requested a  
7 hearing before an administrative law judge (ALJ), which was held on  
8 April 14, 2010, before ALJ Riley Atkins. Tr. 59-83. Plaintiff, who  
9 was represented by counsel, testified. Vocational expert Richard  
10 Hinks appeared but did not testify. Tr. 59-60. The ALJ denied  
11 benefits on April 26, 2010, and the Appeals Council denied review on  
12 August 18, 2011. Tr. 15-25, 1-7. The instant matter is before this  
13 court pursuant to 42 U.S.C. § 405(g).

## **STANDARD OF REVIEW**

15 It is the role of the trier of fact, not this court, to resolve  
16 conflicts in evidence. *Richardson v. Perales*, 402 U.S. 389, 400

18       <sup>2</sup> This is Plaintiff's second application for Social Security  
19 benefits. His prior claim, filed in March 2004, was denied at the  
20 administrative level. ALJ Atkins denied benefits after a hearing in  
21 April 2007, at which vocational expert Barbara Vogel testified. The  
22 Appeals Council denied review in December 2007. Tr. 15. Plaintiff  
23 sought judicial review pursuant to 42 U.S.C. § 405(g), and the  
24 Commissioner's decision was affirmed by this court in March 2009.  
25 (Cause Number CV-08-3003-CI). ALJ Atkins did not find a basis for  
26 reopening the 2004 SSI application in considering the SSI  
application now on review. Tr. 15.

1 (1971). If evidence supports more than one rational interpretation,  
 2 the court may not substitute its judgment for that of the  
 3 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999);  
 4 *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless,  
 5 a decision supported by substantial evidence will be set aside if  
 6 the proper legal standards were not applied in weighing the evidence  
 7 and making the decision. *Brawner v. Secretary of Health and Human*  
 8 *Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If there is substantial  
 9 evidence to support the administrative findings, or if there is  
 10 conflicting evidence that will support a finding of either  
 11 disability or non-disability, the finding of the Commissioner is  
 12 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
 13 1987). "This is a highly deferential standard of review."  
 14 *Valentine v. Commissioner of Social Sec. Admin.*, 574 F.3d 685, 690  
 15 (9<sup>th</sup> Cir. 2009).

#### 16 **SEQUENTIAL EVALUATION PROCESS**

17 The Commissioner has established a five-step sequential  
 18 evaluation process for determining whether a person is disabled. 20  
 19 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
 20 137, 140-42 (1987). In steps one through four, the burden of proof  
 21 rests upon the claimant to establish a *prima facie* case of  
 22 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
 23 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant  
 24 establishes that a physical or mental impairment prevents him from  
 25 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),  
 26 416.920(a). At step five, the burden shifts to the Commissioner to  
 27 show that (1) the claimant can perform other substantial gainful  
 28

1 activity; and (2) a "significant number of jobs exist in the  
 2 national economy" which claimant can perform. 20 C.F.R. §§  
 3 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,  
 4 1498 (9<sup>th</sup> Cir. 1984).

5 **STATEMENT OF THE CASE**

6 The facts of the case are set forth in detail in the transcript  
 7 of proceedings and briefly summarized here. Plaintiff was 54 at the  
 8 time he applied for benefits. He had a high school education and a  
 9 year of college. Tr. 24, 203. At a 2007 hearing, his past work  
 10 experience was described by the vocational expert as a restaurant  
 11 manager, a cook, a cashier, and a tree thinner. Tr. 39-40. In his  
 12 current application for benefits, Plaintiff listed his work as a  
 13 convenience store manager between 1981-2002. Tr. 200. At the April  
 14 2010 hearing, Plaintiff testified he is unmarried with an adult  
 15 daughter in Seattle who he visits regularly. He reported he was  
 16 living with his mother and spent a lot of time with his ex-spouse,  
 17 who lives nearby. Tr. 73-75. Plaintiff testified he attempted to  
 18 work as a truck driver in 2007, but was inadequately trained for the  
 19 job and was laid off after having an accident. Tr. 65. He stated  
 20 he had been receiving mental health treatment over the last four  
 21 years from a therapist who works with his treating physician. Tr.  
 22 64. He stated he could not sustain work due to fatigue, depression,  
 23 anxiety attacks, inability to concentrate, and impaired memory. Tr.  
 24 68-72.

25 **ADMINISTRATIVE DECISION**

26 At step one, the ALJ found Plaintiff had not engaged in  
 27 substantial gainful activity since the SSI application date. He  
 28

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1 found Plaintiff had severe impairments of "major depressive disorder  
2 (recurrent and mild to severe); personality disorder (not otherwise  
3 specified), and a history of alcohol and cannabis abuse (in  
4 remission per claimant). Tr. 17. At step three, he found  
5 Plaintiff's impairments, alone and in combination, did not meet or  
6 medically equal one of the listed impairments in 20 C.F.R., Appendix  
7 1, Subpart P, Regulations No. 4 (Listings). Tr. 18. At step four  
8 he determined Plaintiff had no exertional limitations and numerous  
9 moderate mental limitations that restricted his residual functional  
10 capacity (RFC). Plaintiff's RFC is identical to the RFC assessed in  
11 June 2007. Tr. 19-20, 94.

12 In the step four findings, the ALJ found Plaintiff credible "to  
13 the extent he suffers from some type of impairment," but concluded  
14 allegations that he is incapable of all work activity were not  
15 credible. Tr. 20-21. Relying on vocational expert testimony from  
16 the 2007 hearing, the ALJ found Plaintiff could perform past work as  
17 a tree thinner and cook. Tr. 23, 39-42. In the alternative, the  
18 ALJ made step five findings based on the RFC and vocational expert  
19 testimony from June 2007. Tr. 24. He concluded Plaintiff could  
20 perform other jobs that existed in the national economy such as  
21 janitor, warehouse worker, and packing line worker. Tr. 24, 45-46.  
22 He also found Plaintiff's ability to perform work is compromised by  
23 nonexertional limitations that have "little or no effect on the  
24 occupational base of unskilled work at all exertional levels." Tr.  
25 24. Relying on the Medical-Vocational Guidelines as a "framework,"  
26 he concluded Plaintiff was not disabled as defined by the Social  
27 Security Act. *Id.*

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## ISSUES

2 The question is whether the ALJ's decision is supported by  
3 substantial evidence and free of legal error. Plaintiff argues the  
4 ALJ erred when he: (1) evaluated the medical opinion evidence; (2)  
5 rejected Plaintiff's subjective complaints; (3) failed to conduct a  
6 proper step four analysis; and (4) did not meet his burden at step  
7 five to identify specific jobs Plaintiff could still perform. ECF  
8 NO. 19 at 14. Defendant argues the ALJ's decision is supported by  
9 substantial evidence and without error and should be affirmed. ECF  
10 No. 23.

## DISCUSSION

## 12 A. Treating Source Opinions

13 Plaintiff argues the ALJ improperly disregarded the relevant  
14 opinions of his treating physician, Kimberly Humann, M.D., and his  
15 treating mental health therapist, Candi Didier, M.S. ECF No. 19 at  
16 17-23.

## 1. Dr. Humann

18 A treating or examining physician's opinion is given more  
19 weight than that of a non-examining physician. *Benecke v. Barnhart*,  
20 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating physician's  
21 opinions are not contradicted, they can be rejected only with "clear  
22 and convincing" reasons supported by substantial evidence. *Lester*  
23 *v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If contradicted, the  
24 ALJ may reject the opinion if he states "specific," "legitimate"  
25 reasons that are supported by substantial evidence. See *Flaten v.*  
26 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir.  
27 1995).

1       The record shows Dr. Humann has been treating Plaintiff since  
2 about 2006 at the Central Washington Community Mental Health Center  
3 (CWCMH). Tr. 250-59. Between 2007 and 2009, Dr. Humann monitored  
4 Plaintiff's mental health medication and observed his progress  
5 during treatment over the years. In June 2007, after Plaintiff's  
6 first application for benefits was denied, Dr. Humann opined  
7 Plaintiff still could not work due to depression symptoms and  
8 requested he be reinstated for state assistance. Tr. 245. CWCMH  
9 records indicate once state medical coverage resumed, Plaintiff  
10 returned to CMWCMH for mental health treatment, including  
11 medication. Tr. 415. As noted by his therapist, after one week on  
12 medication, Plaintiff reported a lessening of anxiety symptoms, but  
13 continued to report depressive symptoms. Tr. 416. Treatment  
14 continued throughout the claimed period of disability with limited  
15 and inconsistent improvement. Tr. 455-526, 603-52.

16       In November 2007, the record was reviewed by Sharon Underwood,  
17 Ph.D., who concluded Plaintiff's anxiety and mood disorder would  
18 require a low stress job that does not involve "multi-tasking,  
19 unusually fast-paced work, complex tasks, or work with the public."  
20 Tr. 421. Dr. Underwood's functional limitations were affirmed by  
21 reviewing psychologist, Dr. Beatty, in February 2008 and given some  
22 weight by the ALJ.<sup>3</sup> Tr. 22. 529.

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<sup>3</sup> The ALJ specifically disregarded Dr. Underwood's affirmed  
25 opinion that Plaintiff needed to work away from the public. Tr. 22,  
26 421, 435, 529. He reasoned this requirement was contradicted by  
27 Plaintiff's ability to interact with his former spouse and adult  
28

1       CWC MH records indicate that after Plaintiff resumed mental  
2 health treatment, Dr. Humann and Ms. Didier identified persistent  
3 cognitive deficits and memory problems. Tr. 609-621. In April  
4 2009, based on clinic notes relevant to this claim, Dr. Humann  
5 recommended a neuropsychological evaluation to rule out possible  
6 etiologies for cognitive deficits that were not responding to  
7 treatment. Tr. 611. In August 2009, she filled out a psychological  
8 evaluation form summarizing her findings regarding Plaintiff's  
9 mental limitations and noted marked limitations in Plaintiff's  
10 understanding, memory, and concentration. Tr. 591-93.

11       The ALJ rejected Dr. Humann's assessed limitations because they  
12 were on a check-off form and "not in accordance with the record as  
13 a whole." Tr. 22. He also rejected her recommendation for further  
14 neuropsychological examination because one had been completed in  
15 December 2006, by examining psychologist Roland Dougherty, Ph.D.<sup>4</sup>

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18 daughter, who lived out of town. Tr. 22. This is not a legitimate  
19 reason to reject an opinion regarding Plaintiff's ability to  
20 function in a work environment. *Fair v. Bowen*, 885 F.2d 597, 603  
21 (9<sup>th</sup> Cir. 1989)(abilities not transferrable to "more grueling  
22 environment of the workplace" do not discredit claimed limitations).  
23 The ALJ's reasons for rejecting Dr. Underwood's opinion that  
24 Plaintiff needs a low stress job away from people is not supported  
25 by substantial evidence.

26       <sup>4</sup> Although the ALJ briefly summarized Dr. Dougherty's findings  
27 in the prior decision, Tr. 96, the report is not in the record  
28 before this court. Therefore, the court is unable to ascertain if

1 The ALJ presumed Dr. Humann had not seen the 2006 evaluation prior  
2 to making her 2009 recommendation. Tr. 22, 96. The ALJ's reasons  
3 for disregarding Dr. Humann's recommendation and assessed  
4 limitations are not legally sufficient.

5 In *Crane v. Shalala*, 76 F.3d 251 (9<sup>th</sup> Cir. 1996), the court  
6 affirmed the ALJ's rejection of a physician's check-off opinions  
7 because they did not contain an explanation or reference evidence in  
8 support of his conclusions *Id.* at 254. That is not the case here.  
9 Dr. Humann's conclusions are supported by treatment notes that  
10 document over three years of treatment at CWCMH, as well as  
11 assessments by agency reviewing psychologists who also found  
12 significant limitations in Plaintiff's mental functioning. Although  
13 the ALJ finds Dr. Humann's opinions are "not in accordance" with  
14 other evidence, he references no relevant evidence that contradicts  
15 Dr. Humann's conclusions regarding Plaintiff's worsening cognitive  
16 impairments.

17 The ALJ's reliance on Dr. Dougherty's 2006 evaluation is not  
18 substantial evidence to reject Dr. Humann's treating opinion. See  
19 *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9<sup>th</sup> Cir. 1984) (medical  
20 evidence that pre-dates a claimed period of disability is of limited  
21 relevance). Especially in a case like this, where Plaintiff is  
22 alleging a worsening of his mental condition, a 2006 evaluation of  
23 mental limitations is not probative to Plaintiff's existing mental

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24 Dr. Roland did assess and opine on Plaintiff's cognitive  
25 functioning. The court is also unable ascertain the basis for Dr.  
26 Dougherty's conclusions regarding possible malingering and whether,  
27 in fact, test results were affected by Plaintiff's memory deficits.  
28

1 condition. Regardless of whether Dr. Humann had reviewed the 2006  
 2 report, it is reasonable that she would recommend a new  
 3 neuropsychological evaluation in 2009 to ascertain the cause and  
 4 severity of her patient's increasing difficulties in cognitive  
 5 functioning. The ALJ's brief summary of Dr. Dougherty's 2006 report  
 6 is insufficient evidence to support rejection of Dr. Humann's  
 7 treatment recommendation.<sup>5</sup> Tr. 22, 96. Because the ALJ gave  
 8 inadequate reasons for rejecting Dr. Humann's opinions, they are  
 9 credited. *Lester*, 81 F.3d at 830.

10 **2. Candi Didier, Mental Health therapist**

11 Plaintiff argues the ALJ improperly rejected his therapist's  
 12 opinions. ECF No. 19 at 20. The record shows Plaintiff resumed  
 13 counseling with Ms. Didier at CWCMH in December 2007 after he had  
 14 regained medical coverage. Tr. 415. Her initial evaluation noted  
 15 marked limitations in Plaintiff's cognitive functioning (ability to  
 16 understand, remember and complete complex instructions and complete  
 17 routine tasks) and a marked limitation in his ability to tolerate  
 18 the pressures and expectations of a normal work setting. Tr. 444.  
 19 Several months later she observed Plaintiff's cognitive functioning  
 20 and memory continued to decline, causing him embarrassment and  
 21 increasing his tendency to isolate. Tr. 628. After two years of  
 22 medication and counseling, she completed another evaluation with Dr.  
 23 Humann in which they assessed significant limitations in additional

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 25 <sup>5</sup> Dr. Dougherty's evaluation is not in the record, and the  
 26 court is unable to review what, if any, testing was done to assess  
 27 cognitive deficits and what testing was the basis for his finding of  
 28 possible malingering.

1 categories, including marked limitations in all areas of  
 2 understanding and memory functions. Tr. 591. In April 2010, she  
 3 summarized Plaintiff's ongoing problems with mental functioning and  
 4 her opinion that his cognitive abilities have been deteriorating  
 5 since 2006. Tr. 654. Ms. Didier's observations and opinions are  
 6 amply supported by detailed treatment notes and assessments covering  
 7 36 months of counseling. See Tr. 442-49, 542-49, 603, 609-47, 654.

8 As a mental health professional, Ms. Didier is considered an  
 9 "other source" under the Commissioner's regulations. 20 C.F.R.  
 10 § 416.913(d)(medical sources not listed as "acceptable medical  
 11 sources"). The ALJ is required to consider other source opinions  
 12 "as to how an impairment affects a claimant's ability to work."  
 13 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9<sup>th</sup> Cir. 1987); see also 20  
 14 C.F.R. §§ 416.929(c)(3), .945. To properly discount an other source  
 15 opinion, the ALJ is obligated to give specific reasons "germane" to  
 16 that medical provider. *Stout v. Commissioner, Social Security*  
 17 *Admin.*, 454 F.3d 1050, 1053 (9<sup>th</sup> Cir. 2006).

18 Here, the ALJ's reasoning that Ms. Didier's opinions deserve  
 19 little weight because she is not an "acceptable medical source" and  
 20 her opinions are not supported by other medical evidence does not  
 21 satisfy the standard of specific or germane. Also, his findings do  
 22 not comply with the Commissioner's directives in SSR 06-03p (factors  
 23 that must be considered in weighing "other source" opinions). As an  
 24 "other medical source," Ms. Didier is by definition not an  
 25 "acceptable medical source" qualified to diagnose an impairment.  
 26 Therefore, the first reason is not germane to Ms. Didier's  
 27 observations and opinions as Plaintiff's therapist. The second

1 reason lacks the requisite specificity. As discussed above, Ms.  
 2 Didier's opinions regarding Plaintiff's work-related limitations are  
 3 supported by Dr. Humann's treatment notes and opinions. In  
 4 conjunction with Dr. Humann's credited opinions, Ms. Didier's  
 5 findings and conclusions are significantly probative and warrant  
 6 considerable weight. 20 C.F.R. §§ 416.913(d), 416.929(c)(3),  
 7 416.945; *Taylor v. Commissioner of Social Sec. Admin.*, 659 F.3d  
 8 1228, 1234 (9<sup>th</sup> Cir. 2011) (nurse practitioner considered an  
 9 "acceptable medical source" when working closely with medical  
 10 doctor); SSR 06-03p (more weight given to provider's opinion where  
 11 treatment relationship is lengthy and opinions are consistent with  
 12 other evidence). The ALJ's unexplained rejection of Ms. Didier's  
 13 clinic notes and conclusions regarding the effects of Plaintiff's  
 14 mental impairments on his ability to work is reversible error.  
 15 *Stout*, 454 F.3d at 1056.

16 **B. Credibility**

17 Plaintiff argues the ALJ did not give sufficiently "clear and  
 18 convincing reasons" for rejecting his subjective complaints. ECF  
 19 No. 24 at 6-8. The Ninth Circuit has ruled that an ALJ's credibility  
 20 determination must be supported by findings sufficiently specific to  
 21 permit the court to conclude the ALJ did not arbitrarily discredit  
 22 claimant's testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup>  
 23 Cir. 1991)(en banc). To meet this requirement, an ALJ must provide  
 24 "specific, cogent reasons for the disbelief" to reject a claimant's  
 25 subjective complaints. *Id.* The court has expanded this standard  
 26 where there is no affirmative evidence of malingering, in which case  
 27 reasons for rejecting a claimant's subjective complaints must be  
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1 "clear and convincing." *Lester*, 81 F.3d at 834; see also *Taylor v.*  
2 *Commissioner of Social Sec. Admin.*, 659 F.3d 1228, 1234 (9<sup>th</sup> Cir.  
3 2011); *Vasquez v. Astrue*, 572 F.3d 586, 591 (9<sup>th</sup> Cir. 2009);  
4 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9<sup>th</sup> Cir. 2007);  
5 *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998); *Swenson v.*  
6 *Sullivan*, 876 F.2d 683, 687 (9<sup>th</sup> Cir. 1989).

7 Here, the ALJ's findings are not adequate to support his  
8 rejection of Plaintiff's allegations. Of initial concern is that  
9 his reasoning appears to be based on many factors that were relevant  
10 in the prior claim but have little or no relevance to this claim,  
11 e.g., a remote history of drug abuse and a prior criminal record.  
12 Tr. 21. Specifically, the ALJ identifies no evidence in the  
13 relevant medical records or third party observations in the record  
14 to indicate these factors were significant at any time during the  
15 claimed period of disability. Tr. 21.

16 Other reasons given do not satisfy the "clear and convincing"  
17 standard. For example, the ALJ found Plaintiff's failure to follow-  
18 up with treatment and failure to take medication regularly are  
19 indicative of a lack of motivation which adversely affects his  
20 credibility. *Id.* However, the record clearly shows Plaintiff lost  
21 medical coverage temporarily and was unable to access mental health  
22 services or medication. Once medical coverage was restored, he re-  
23 engaged in treatment at CWCMH. Tr. 415. In addition, the fact  
24 that he forgets to take medication or lets his prescription expire  
25 is consistent with his complaints of memory loss. The ALJ erred in  
26 drawing inferences about Plaintiff's credibility without considering  
27 documented evidence of increasing memory loss and the interruption  
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1 of medical coverage. See *Orn v. Astrue*, 495 F.3d 625, 638 (9<sup>th</sup> Cir. 2007)(credibility not implicated where claimant reasonably explained 2 his failure to take medicine); *SSR* 96-7p.

3 The ALJ also construed medical evidence that Plaintiff's 4 anxiety symptoms improved with medication as an indication that 5 Plaintiff was exaggerating. Tr. 21. Although the record shows 6 medication appears to have relieved some of Plaintiff's anxiety and 7 depression symptoms, Tr. 452-54, 539, 609, 613-14, the record also 8 shows Dr. Humann observed cognitive deficits and attendant 9 limitations in performing work related activities persisted in spite 10 of medication and treatment. See, e.g., Tr. 613-14. Her observations 11 are consistent with reports of Plaintiff's persistent memory 12 problems, inability to concentrate or stay on task, and his attempts 13 to hide these problems. See generally Tr. 604-54.

14 Finally, the ALJ's recitation of Plaintiff's daily activities 15 is not sufficient to impugn Plaintiff's credibility. Tr. 18, 23. 16 The unstructured day-to-day household activities reported by 17 Plaintiff and Plaintiff's ex-spouse are not inconsistent with 18 Plaintiff's claimed limitations and do not involve a level of mental 19 functioning that would be transferable to the workplace. *Reddick*, 20 157 F.3d at 722. As this court has ruled, a claimant must not be 21 totally incapacitated to be eligible for disability benefits. *Fair*, 22 885 F.2d at 603; *Cooper v. Bowen*, 815 F.2d 557, 561 (9<sup>th</sup> Cir. 1987). 23 The ALJ's credibility findings are not supported by substantial 24 evidence.

25 **C. Remedy**

26 Where an ALJ's determination is not supported by substantial

1 evidence or is tainted by legal error, the court may remand a case  
2 for additional proceedings or an immediate award of benefits.  
3 Remand for additional proceedings is proper where (1) outstanding  
4 issues must be resolved, and (2) it is not clear from the record  
5 before the court that a claimant is disabled. See *Benecke v.*  
6 *Barnhart*, 379 F.3d 587, 593 (9<sup>th</sup> Cir. 2004).

7 Here, the ALJ erroneously rejected the opinions of treating  
8 physician Humann and mental health counselor Didier. Crediting Dr.  
9 Humann's opinions, it appears Plaintiff's cognitive functioning has  
10 worsened. However, the record is not clear that Plaintiff is  
11 totally disabled. Enhancement of the record is necessary to  
12 resolve outstanding issues regarding Plaintiff's mental limitations.  
13 A new neuropsychological examination is necessary to identify the  
14 etiology of Plaintiff's limitations and clarify ambiguities created  
15 by the ALJ's reliance on Dr. Dougherty's 2006 evaluation and prior  
16 vocational expert testimony.

17 Because Plaintiff's treating physician and treating mental  
18 health counselor have identified limitations in excess of those  
19 found in prior proceedings, new vocational expert testimony will be  
20 required at step four and possibly step five to determine if there  
21 is other work Plaintiff can perform with mental limitations  
22 supported by the record. *Matthews v. Shalala*, 10 F.3d 678, 681 (9<sup>th</sup>  
23 Cir. 1993) (*citing DeLorme v. Sullivan*, 924 F.2d 841, 850 (9<sup>th</sup> Cir.  
24 1991) (vocational expert testimony that does not consider all  
25 limitations supported by the record is without evidentiary value)).

26 On remand, the ALJ shall re-evaluate the relevant medical  
27 evidence in combination with a new neuropsychological examination;

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1 re-evaluate Plaintiff's credibility; re-assess Plaintiff's RFC; and  
2 take new vocational expert testimony based on limitations supported  
3 by the entire record and newly assessed RFC. Accordingly,

4 **IT IS ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is  
6 **GRANTED**. The ALJ's decision is reversed and the matter is remanded  
7 to the Commissioner for additional proceedings consistent with this  
8 Order and pursuant to 42 U.S.C. § 405(g).

9 2. Defendant's Motion for Summary Judgment, **ECF No. 22**, is  
10 **DENIED**.

11 3. An application for attorney fees may be filed by separate  
12 motion.

13 The District Court Executive is directed to file this Order and  
14 provide a copy to counsel for Plaintiff and Defendant. Judgment  
15 shall be entered for Plaintiff, and the file shall be **CLOSED**.

16 DATED May 7, 2013.

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S/ CYNTHIA IMBROGNO  
19 UNITED STATES MAGISTRATE JUDGE  
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